

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

KERRY DEVIN O'BRYAN,

Plaintiff,

v.

Case No. 05-73226

BUREAU OF PRISONS,

HONORABLE AVERN COHN

Defendant.

ORDER ADOPTING MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION
AND
GRANTING DEFENDANTS' MOTION TO DISMISS OR IN THE ALTERNATIVE FOR
SUMMARY JUDGMENT
AND
DISMISSING CASE

I.

This is a prisoner civil rights case under 42 U.S.C. § 1983. Plaintiff Kerry Devin O'Bryan (O'Bryan), an inmate in the custody of the Federal Bureau of Prisons (BOP), is suing the Bureau of Prisons and various Bureau of Prisons officials, claiming that they violated his right to the free expression of his religion under the First Amendment to the United States Constitution.

On September 29, 2005, the Court entered an order referring pretrial proceedings to a magistrate judge. See Order of Reference to United States Magistrate Judge, filed September 29, 2005. On March 16, 2006, defendants filed a motion to dismiss or for summary judgment. The magistrate judge on April 21, 2006, issue a report and recommendation (MJRR), recommending that defendants' motion be

granted. Before the Court are plaintiff's objections to the MJRR.

II.

A.

The MJRR sets forth the relevant background of this case. Briefly, O'Bryan is a practitioner of Wicca, a polytheistic faith. He filed suit in 2002 in the United States District Court for the Southern District of Illinois, where he was then housed, against the BOP and various BOP officials. He claimed that BOP Program Statement 5360.68, which specifically prohibited the casting of spells, violated his First Amendment rights and the provisions of the Religion Freedom Restoration Act, 42 U.S.C. § 2000bb et seq. The matter was extensively litigated in the district of Illinois and eventually, in 2004, O'Bryan was granted a preliminary injunction which permitted him to practice his religion, including the casting of spells. At about the time the injunction was set to expire, O'Bryan was transferred to FCI Milan, located in this district. O'Bryan moved to reinstate the injunction. The district court in Illinois denied the request and transferred the case to this district.

O'Bryan then filed several motions, which were referred to the magistrate judge. After adopting a report and recommendation of January 9, 2006, the BOP is the only remaining defendant.

As noted above, the BOP filed a motion to dismiss or for summary judgment on the grounds that the case is moot because BOP Program Statement 5360.68 has been rescinded and replaced by a new policy which contains no blanket prohibition on the casting of spells. The new BOP Program Statement, 5360.09 (effective December 31, 2004) prohibits "language or behaviors that could reasonably be construed as a threat

to safety, security, or the orderly running of the institution, (e.g. curses)[.]”

B.

The magistrate judge explained that because O'Bryan brought this action challenging a policy which no longer exists, his case is moot. The magistrate judge also noted that to the extent O'Bryan claims that the new policy infringes upon his religion, he must exhaust his administrative remedies as to the new policy before filing suit.

O'Bryan's objections to the MJRR contain the same arguments considered and rejected by the magistrate judge. O'Bryan alleges that the new policy violates his rights and the officials at Milan have interfered with his ability to cast spells in the application of the new policy. These allegations, however, are directed at the new policy. This case concerns the old policy. O'Bryan must exhaust his administrative remedies. If his complaints are not resolved through the prison grievance process, he can then file a new lawsuit challenging the new policy.

III.

Accordingly, the findings and conclusions of the magistrate judge are adopted as the findings and conclusions of the Court. Defendants' motion to dismiss or for summary judgment is GRANTED. This case is DISMISSED. All pending motions are DENIED AS MOOT.

SO ORDERED.

Dated: May 25, 2006

s/Avern Cohn
AVERN COHN
UNITED STATES DISTRICT JUDGE

05-73226 O'Bryan v. Bureau of Prisons

Proof of Service

I hereby certify that a copy of the foregoing document was mailed to counsel of record on this date, May 25, 2006, by electronic and/or ordinary mail.

s/Julie Owens

Case Manager

(313) 234-5160